Supreme Court, U.S.
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No. 97-1271

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Dr. TENKASI M. VISWANATHAN --- PETITIONER

VS.

THE FAYETTEVILLE STATE UNIVERSITY

BOARD OF TRUSTEES et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the Respondents concede that the only right Petitioner enjoyed was access to a three-level post termination appeal process, granted by the university tenure Policies and Regulations, what is the legal basis for such a right, if not an application of the theory of unilateral contract modification?

2. Where it is conceded that the only right Petitioner enjoyed was access to a three-level post termination appeal process, and where in each one of the three levels, the decision is rendered by a panel of six or more persons, what is the legal basis, after the appeal process has begun, for a decision by the FSU Chancellor acting as a single person? Between the original decision of the FSU Dean and the de novo decision of the FSU Chancellor, which one constitutes the right decision for appellate review by the levels of appellate process? Is this not a matter for the jury to decide?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

REPLY TO BRIEF IN OPPOSITION

Petitioner Viswanathan respectfully submits this Reply to Respondents' Brief in Opposition addressing two new points raised in the Brief.

I. WHAT IS THE LEGAL BASIS FOR THE RIGHT PETITIONER ENJOYED TO ACCESS APPEAL PROCEEDINGS, EVEN THOUGH HE WAS NOT EMPLOYED BY FSU?

While the Respondents keep asserting that Petitioner's status after the February 8, 1990 notice of non-renewal of his first appointment at FSU is one of legal nullity, they nevertheless concede at page 8 of their Brief in Opposition that "[t]he only right Petitioner enjoyed was access to a three-level post termination appeal process, granted by the FSU Tenure Policies and Regulations for appeals of non-reappointment decisions". They do not explain how in 1993, three years after the termination of his original appointment in 1990 and two years after

Viswanathan had already finished running through all three levels of appellate proceedings by September 16, 1991, Viswanathan could have again gained the right to another set of three-level appellate proceedings? What is the legal basis for such a right giving him access to two sets of three-level appellate proceedings?

The first set of the three-level appellate proceedings resulted in the September 16, 1991 Order of the UNC Board of Governors, where the Board made a modification to the Regulations as explained below. Appendix to Petition at A-19, A-23. The UNC Board found that the February 8, 1990 non-reappointment decision could have been impermissibly based on Viswanathan's critical remarks' "[o]n December 4, 1989 at a faculty meeting with the Chancellor". Since the FSU Tenure Policies and Regulations did not provide a procedure for handling a non-reappointment decision that is found to be impermissibly based, the Board had to make a modification to the regulations through its September 16, 1991 Order(Appendix to Petition at A-23, A-24) as follows:

> An appropriate remedy in cases, where a non-reappointment decision is based on an impermissible reason is to conduct a new review of the faculty member's credentials. * * * To accomplish these ends, the Committee recommends that the non-reappointment decision be reversed and that Professor Viswanathan be given an opportunity to request reappointment as an Associate Professor. This request, if made should follow the procedures prescribed by FSU Tenure Regulations and should be initiated at the department level."

Under the holding of Yartzoff v. Democrat-Herald Publishing Co., 281 OR 651, 576 P.2d 356 (1978), the order of September 16, 1991 of the UNC Board is a modification of the original contract, and the Petitioner's adherence to it by his compliance with the requirements of the application process, and the regulations provided sufficient consideration for any such modification. Also, Weiner v. McGraw-Hill, Inc., 57 N.Y2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441: "If the employer makes a promise, either express or implicit, * * * the contract is modified once 'the employee has begun or rendered some of the requested [ordered] service or given any other consideration.'" Also Loffa v. Intel Corporation, 153 Ariz. 539, 544-545, 738 P.2d 1146, 1151-1152 (1987):

New provision distributed subsequent to the original employment contract may modify the original status of the employment relationship.

Petitioner draws to the attention of the Court the following: When Viswanathan's new application made in September 1991 did not result in a job offer, Respondents refused to recognize any right of the Petitioner for any level of post-terminal appeal process alleging that those procedures only applied to employees. Appendix to Petition for Writ of Certiorari at A-37, A-38 and the Order on Petition for Judicial Review at A-28- A-30. Now in their Brief in Opposition, they concede that Petitioner had a right to a second round of access to a three-level post termination appeal process. But, they do not explain what the legal basis of this right is and how their theory of Petitioner's status of legal nullity is compatible with this right.

Had Petitioner not followed the prescribed procedures in the FSU Tenure Policies, Respondents would have immediately terminated all proceedings. In the same vein,

FSU is bound by the regulations and in particular by Section 5 of the FSU Tenure Policies. Please see Wagner v. Sperry Univac. Div. Of Sperry Rand Corp., 458 F.Supp. 505 (E.D. Pa. 1978), aff'd. without op., 624 F.2d. 1092 (3rd Cir. 1978).

In Pine River State Bank v. Mettile, 333 N.W.2d 622, (1983), the Minnesota Court applied the theory of unilateral contract modification: Petitioners' continued performance of the regulatory procedures afforded necessary considerations and FSU gained advantage through reputation as a protector of academic freedom, so important to FSU. Please see importance of academic freedom to FSU in retaining faculty members of high quality. Appendix to Petition at A-44, A-45, and A-42. "[T]he jury could have found the existence of a contract between the parties." Petitioner had requested a jury trial as to all issues.

II. WHAT IS THE LEGAL BASIS FOR THE CHANCELLOR'S INTERFERENCE?

The Respondents concede at Page 8 of their Brief in Opposition that Petitioner had a right to a three-level

appellate proceedings. These three levels are as follows: A review by the FSU Hearing and Reconsideration Committee dated July 12, 1993 (Petition for Certiorari at 23 and Appendix to this Reply to Brief in Opposition at A-16), a review by the FSU Board of Trustees dated October 5, 1993 (Appendix to Petition at A-32) and a review by the UNC Board of Governors dated September 9, 1994 (Appendix to Petition at A-35, A-40). Respondents concede that there are only three levels of appellate proceedings. How then can one explain a legal basis for the August 2, 1993 decision of Respondent Hackley, then Chancellor of FSU, given the Respondents' own assertion that the Chancellor is not one of the three levels of appeal proceedings. Brief in Opposition at page 6, and Petition for Certiorari at 24.

Moreover, each one of the three levels of appellate proceedings consisted of a panel of at least six members. The Appendix to this Reply to Brief in Opposition at A-1, A-27 contains the names of all six members of the FSU Hearing and Reconsideration Committee; the FSU Board of Trustees

is composed of 13 persons (N.C.G.S., Section 116-31 at Appendix to this Reply to Brief in Opposition at A-18); the Committee on University Governance that made the Report at A-35 of Appendix to Petition consists of six elected members (The Code: The University of North Carolina, Section 301(d) at A-17 of Appendix to this Reply to Brief in Opposition) and the UNC Board that approved the Report consists of 16 elected members (N.C.G.S., Section 116-6 at A-18 of Appendix to this Reply to Brief in Opposition). Thus, given that the appeal process started in June, 93 (Petition for Certiorari at 23 and Appendix to this Reply Brief at A-1), and that each one of the three levels of appeal proceedings consisted of a panel of at least six members, how does one explain the action by Respondent Hackley, then Chancellor acting as **a single person** and exercising a decision on August 2, 1993? Moreover, the Chancellor is one of the academic officers in the channel for review of faculty's credentials (Appendix to Petition at A-49, A-50), prior to the initiation of appeal proceedings. He is also the

CEO of FSU. Under North Carolina Law, the functions of advocacy and adjudication shall not be performed by the same person in the administrative process. Appendix to this Reply Brief in Opposition at A-19. What is under review is the decision of Respondent Jon Young and the focus of inquiry is if Respondent Young acted impermissibly under one or more of the impermissible grounds stated in Section 5.A. of the FSU Tenure Policies? Under these circumstances, a decision by the Chancellor standing alone is of no consequence until its inclusion in the appellate process on October 5, 1993, when the FSU Board of Trustees decided to accept the Chancellor's decision in the appeal process. Of the two decisions one by Respondent Young and the other by Respondent Hackley, "which one is the correct decision that should go forward in the appeal process" is a question of material fact that should be decided by the jury.

The sole duty of the Chancellor under the UNC Code was to forward the Decision of the Hearing and Reconsideration Committee to the FSU Board of Trustees,

since there is no direct communication between the Hearing Committee and the Board of Trustees. (Appendix to Petition at A-63, A-64.) It could be argued that the regulations are ambiguous about a decision by the Chancellor after the appeal process has begun and that "reasonable minds could differ" about this issue. Under those circumstances, the issue is for the jury to decide. Lewis v. Equitable Life Assurance Society of the U.S., 389 N.W.2d 876 (1986). The employer could not be permitted to be "the sole judge and final arbiter of the propriety" of the decision of a single administrator – that too the C.E.O. of FSU ---, since it would increase arbitrarily the number of appeal proceedings to four. Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 620-624, 292 N.W.2d 895-897.

Like the theory and practice of "corrective discipline" endorsed by the South Dakota Court in Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (1983), the UNC Board through its September 16, 1991 Order created a theory of remedies for impermissible non-reappointment decisions, and stated as

in Osterkamp a procedure for implementing the remedial theory. That required adherence to the procedures in Section 5.G. of the FSU Tenure Policies, a holding also affirmed by the Superior Court of New Hanover County. Appendix to Petition at A-30, A-31. Under this theory, the sole focus of inquiry is the motivation and behavior of Respondent Young.

CONCLUSION

Based on the decision by the Third Circuit Court of Appeals in Wagner, 624 F.2d. 1092 (3rd Cir. 1978), and other relevant decisions by various State Courts of last resort, cited above and the Petition for Certiorari, the Petition for certiorari should be granted.

Respectfully submitted this the 14th day of April 1998.

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APPENDIX

APPENDIX A

Hearing and Reconsideration Committee
Fayetteville State University
Fayetteville, North Carolina

T.M. Viswanathan, Petitioner Fayetteville State University, and Acting Dean Jon Young, Respondent	DECISION of the Hearing and Reconsideration Committee

The Hearing and Reconsideration Committee (hereafter referred to as the Committee) convened on Wednesday, June 2, 1993 to hear the case of Dr. T.M. Viswanathan, Petitioner, and Fayetteville State University (hereafter FSU), Respondent. The Committee consisted of Dr. Clarence White, Chairman, and Drs. Ophelia Holmes, Elaine Newsome, Barry Griffin, Rolland Johnson, and Claude Hargrove. (Dr. Griffin had to leave the meeting during the recess in the afternoon, did not return and did not participate in the decision meeting on the following day.) Dr.

Viswanathan was accompanied by Dr. Phillip Maguire as Faculty Advocate, while FSU was represented by Dr. Jon Young, Acting Dean of the College of Arts and Sciences.

Minutes prior to the formal opening of the meeting, the Committee convened to consider a request on the part of the Respondent, as represented by Dr. Jon Young, Acting Dean, to exclude Dr. Claude Hargrove, a member of the Committee, from the hearing. In a letter addressed to the chairman of the Committee, Dr. Clarence White, Dr. Young challenged the ability of Dr. Hargrove to render an impartial decision in the present case since the latter is allegedly in current pursuit of a grievance against the Acting Dean, Dr. Young.

The Committee ruled against the request of Dr. Young. It affirmed its confidence in the integrity of Dr. Hargrove to be able to maintain objectivity in the current case and to be able to sort through the particulars of the case at hand on the basis of its own merit.

The hearing was ordered by The General Court of Justice, Superior Court Division, File No. 92 CVS 2024, of New Hanover County, North Carolina. Signed by the presiding Superior Court Judge Quentin Sumner, the Court ordered Fayetteville State University to give the Petitioner, among other things, the " * * * opportunity to request a review of Dr. Jon M. Young's decision by the Hearing and Reconsideration Committee *." In this court's decision, it found that the rights of the Petitioner had been prejudiced because the University had made a final decision based upon unlawful process and procedure " * * under N.C. Gen. Stat, Section 150B-51(b)(3) in that the Petitioner was denied the process and procedure set out in Section 5 of the Fayetteville State University Tenure Policies and Regulations * * *.

A brief history of the case shows that Dr. Viswanathan was originally appointed to a one-year tenure track term at FSU, was not reappointed and followed the appeal procedures as appropriate and specified by the UNC Code and the Tenure Policies and Regulations established at

FSU. Claiming dismissal on impermissible grounds as specified by Section 5 of the FSU Tenure Policies and Regulations, the Petitioner was granted a favorable decision by the Hearing and Reconsideration Committee in its May 8, 1990 meeting, and that body recommended that the decision not to reappoint be reversed. On August 24, 1990, Chancellor Lloyd Hackley did not accept the decision and again ruled for non-reappointment, and the latter's ruling was subsequently upheld by the Board of Trustees at FSU. The Petitioner then appealed to the UNC Board of Governors who, on Sept. 13, 1991, reversing the position of FSU, found that the non-reappointment could have been based on impermissible grounds. Thus the Board of Governors remanded the case back to FSU for another review with the prior taint removed, and allowed for a current review of the Petitioner's credentials with the appeal to be undertaken by the policies established under the FSU Tenure Policies and Regulations.

On May 6, 1992, Chancellor Hackley informed President C.D. Spangler, President of the UNC Board of Governors, of his decision not to reappoint Dr. Viswanathan based upon the recommendations of the Dept. Chair of Mathematics, Dr. Morris Blount; the Acting Dean of the College of Arts and Sciences, Dr. Jon Young; and the Acting Vice Chancellor of Academic Affairs, Dr. Leo Edwards. As part of this same action, the faculty of the Math Dept. Had voted unanimously in favor of reappointment with one abstention. Following this latter decision by Chancellor Hackley not to reappoint, the Board of Governors upheld the Chancellor's decision on June 16, 1992. The Petitioner then appealed for a Judicial Review and the hearing before the Superior Court was held on February 8, 1993. The ruling of the Court has been specified in the third paragraph of this report, and it was the result of that ruling that compelled the present meeting of the Hearing and Reconsideration Committee.

The opening presentation of the meeting was the case by the Petitioner, Dr. Viswanathan, citing the court order for the hearing and contending that Dr. Young's decision not to reappoint him was impermissible on basis of:

1. Violation of his First Amendment rights as guaranteed by the US Constitution and the N. Carolina Constitution;
2. Personal malice on the part of Dr. Young, in violation of section 5.A. of the Tenure Policies and Regulations of FSU;
3. Discrimination by Dr. Young against Dr. Viswanathan because of his national origin which is Asian [of India].

He further contended that the second review of his case which the Board of Governors had remanded back to FSU had not followed that Board's mandate that:

1. The prior taint should be removed, a fresh new look was to be taken at the Petitioner's credentials; and
2. The procedure should follow the procedures prescribed by the FSU Tenure Policies and Regulations and initiated at department level.

Accompanying the case of the Petitioner was an extensive set of documentary evidence including 377 exhibits and 34 pages of preliminary exhibits, as well as an additional treatise, well in excess of 110 pages which provided a narrative of his effort to become reappointed at FSU as well as his interpretation of the many administrative decisions and hearings for and against his case. The exhibits highlighted the correspondence between himself and all administrative components of the university system involved in his case, comprehensive evaluations by the department chair and students, as well as vitae and more.

The case against reappointment was presented by the Acting Dean of the College of Arts and Sciences, Jon Young. Speaking for and acting on behalf of the university, Dr. Young based his reasoning for the negative decision against the Petitioner, Dr. Viswanathan, upon the following items:

1. The recommendation of the Department Chair, Dr. Morris Blount;

2. The unsuitedness of Dr. Viswanathan to coordinate a Math Education program of lower level math;
3. The student evaluations of the Petitioner's courses based upon the spring 1990 data being below the university average;
4. The excellent research and publications record of Dr. Viswanathan being an indication of potentially ineffective performance in lower level courses;
5. Dr. Viswanathan's area of expertise, algebra, not being a current area of the university's needs; and
6. The irrelevance of Dr. Viswanathan's recent professional activities, which include both a year of secondary school teaching and a North Carolina certification in math in which the Petitioner scored at the 99 percentile level.

The Hearing and Reconsideration Committee found unanimous disagreement with each of the items listed above which were presented by the Respondent, Dr. Young, as reasons for not reappointing the Petitioner, Dr. Viswanathan. The essence of the deliberations of the Committee and the

conclusions of that body taken in the seriatim order as listed on the previous page, went as follows:

1. The department chair recommendation. The decision not to reappoint Dr. Viswanathan did NOT begin on the department level as the Board of Governors mandate of September 13, 1991 required. Exhibit E-121, presented by the Petitioner, is a copy of the FSU faculty personnel action form which was mistakenly sent to him by Dr. Young. In favor of reappointing Dr. Viswanathan, the document clearly shows the unanimous consent of the tenured faculty of the department with one abstention, the signature of Dr. Blount, the department chair, in agreement with the faculty decision, and his signature dated March 17, 1992. On the next line, there appears the signature of Dr. Young disagreeing with the decision, but dated April 30, 1992. When another version of this same form was sent to Dr. Viswanathan the following day, it indicated the disagreement of Dr. Blount for the Petitioner's reappointment, but yet it was initialed and

dated back to March 17, 1992, as if Dr. Blount had agreed and changed his mind on the same day. It was unmistakably obvious to the Committee that contrary to the testimony of Dr. Young, the decision to not reappoint Dr. Viswanathan DID come from above, and the department chair knew of the negative action taken by his administrative superior, Acting Dean Jon Young, at least thirteen days before he made his negative decision. The Committee construed this act of intentional deception commencing at least at the level of the Acting Dean with subsequent complicity of the department chair to conform to that decision, to be a definite act of bad faith inflicted by the administration upon the Petitioner.

2. The unsuitedness of Dr. Viswanathan to coordinate a Math Education program. This item presented [by] Dr. Young is totally new and is unsupported by any documentation that it was ever a factor in any administrative decision concerning Dr. Viswanathan until the day of the hearing before the Committee. Because of

its novelty and total absence of documentation, the Committee unanimously rejected it as unworthy of serious consideration.

3. The student evaluations. The Petitioner presented four exhibits detailing the evaluation of the students in his classes for Spring 1990. Based upon a maximum of five, the scores were:

Average Score	University Average	Course	# of Students
3.77	4.21	College Algebra	18
3.78	4.21	Finite Math	9
4.26	4.21	College Algebra	20
4.27	4.21	Modern Algebra	3

It was the stated position of Respondent, Dr. Young, that these scores --- two of them being below the university average --- are worthy of non-reappointment. The Committee strongly disagreed with that assessment by Dr. Young. All members have been judged by the same evaluation instrument for many years, and are fully aware that these scores are exemplary. Moreover, Dr. Young's position with regard to the eminence of the university

average as an evaluative tool was both challenged by the Committee, and based upon the breadth of categories it includes, was held in little regard by that body. Averages usually include a distribution above and below some median value which, depending upon its symmetry, can possibly include fully half the faculty below and above the median level. According to the reasoning of Dr. Young, who would not reappoint faculty members whose rating fell below the university average, fully half the faculty should be discharged.

4. The research and publication record of Dr. Viswanathan. As was brought out in testimony by a sworn witness, the research and publication record of Dr. Viswanathan was far superior to that of any of the math faculty current at that time of the hearing. Moreover, the need of the university for a person of such a background was likewise a part of sworn testimony. The Committee did not favorably view the reasoning of the Respondent, Dr. Young, that the demonstrated excellence in research by

the Petitioner automatically excluded him from excellence in the classroom. Moreover, the Committee felt that the student evaluations amply demonstrated just such mastery.

5. The lack of need of the university for an algebraist. Here again, the Committee accepted the sworn testimony of an informed member of the math department and held little regard for the reasoning of the Respondent.
6. The recent activities of the Petitioner. Though diminished in importance by FSU as evinced in the testimony of Dr. Young, the passing of the NTE at a 99 percentile level in ANY pool of other exam-takers, the resulting North Carolina certification in math teaching, and his recent work teaching on the secondary level were held in high regard by the Committee.

In summary, based upon the evidentiary excellence shown by the case as presented by the Petitioner, Dr. T.M. Viswanathan, the Hearing and Reconsideration Committee finds no reason for which he should have been denied a

second one-year contract at FSU. The case as presented by the Respondent, Fayetteville State University/Dr. Jon Young, did not provide evidence of good faith nor substance in choosing not to reappoint him. In failing to recognize any merit in the negative choices made by FSU with regard to the Petitioner, Dr. Viswanathan, the Committee cannot avoid the conclusion that Fayetteville State University, as represented by the decisions against Dr. Viswanathan, DID act with PERSONAL MALICE against the Petitioner. The Committee also finds that the mandate as directed by the board of Governors directive of September 13, 1991, requiring that Dr. Viswanathan's request for reappointment follow the guidelines of FSU's Tenure Policies and Regulations, and that the actions be initiated at the department level was NOT followed. In fact, the evidence clearly shows that the initial decision to not reappoint began, at least, in the office of the Dean of the College of Arts and Sciences, Dr. Jon Young.

The Committee further finds that the considerations undertaken by Dr. Jon Young did not remove the prior taint as ordered by the Board of Governors, and that there is a strong likelihood that some of the judgments made in the Dean's office may have been an outgrowth of past statements of Dr. Viswanathan which, even when used surreptitiously, are a violation of the Petitioner's first amendment rights.

In addition, the Committee agrees that the requirement by Dr. Young that made Dr. Viswanathan submit proof of his visa status before making an offer of employment was inappropriate and had a chilling effect on the processing of Dr. Viswanathan's application. It was in the Committee's opinion, a delaying strategy used by Dr. Young to frustrate Dr. Viswanathan's efforts to have a timely disposition of his employment application. The Committee thereby construed that to the extent that this improper requirement was a tool which could only have been used against a person who was not of American descent, it is a de facto mode of

discrimination against Dr. Viswanathan because of his national origin.

Finally, it is the unanimous opinion and recommendation of the Hearing and Reconsideration Committee, as a result of its deliberations on June 3, 1993, having carefully considered the details presented on both sides of this complex case, that the Petitioner, Dr. T.M. Viswanathan, should be granted the second one-year contract on the tenure track at Fayetteville State University. Moreover, the Committee further feels that this unjustified sequence of actions taken by the university over the four years that it has taken thus far to resolve this matter, that the university is morally bound to offer Dr. Viswanathan financial compensation for the pain and suffering which he and his family has had to endure, as well as his loss of salary during this period.

The deliberations, findings and recommendations of the Hearing and Reconsideration Committee are hereby respectfully submitted on this day of July 12, 1993.

(Sd.) _____
Dr. Clarence White, Jr.
Chairman, Hearing and
Reconsideration Committee

(Sd.) _____
Dr. Claude Hargrove, member

(Sd.)_____
Dr. Roland E. Johnson,
member

(Sd.) _____
Dr. Elaine M. Newsome,
member

(Sd.) _____
Dr. Ophelia M. Holmes,
member

APPENDIX B

THE CODE
BOARD OF GOVERNORS
THE UNIVERSITY OF NORTH CAROLINA

SECTION 301.

THE STANDING COMMITTEES: MEMBERSHIP AND JURISDICTION

301 E. The Committee on University Governance shall consist of six elected members.

APPENDIX C

NORTH CAROLINA GENERAL STATUTE 116-6

ELECTION AND TERMS OF MEMBERS OF BOARD OF GOVERNORS

(a) As the terms of members of the Board of Governors provided for in G.S. 116-5 expire, their successors shall be elected by the Senate and House of Representatives. Sixteen members shall be elected at the regular legislative session in 1993 and every two years thereafter. * * *

APPENDIX C

NORTH CAROLINA GENERAL STATUTE 116-31

MEMBERSHIP OF THE BOARDS OF TRUSTEES

(d) Effective July 1, 1973, each of the 16 constituent institutions shall have board of trustees composed of 13 persons chosen as follows:

(1) Eight elected by the Board of Governors,

(2) Four appointed by the Governor, and

(3) The president of the student government ex officio.

NORTH CAROLINA GENERAL STTAUTE 150B-1

POLICY AND SCOPE OF N.C. ADMINISTRATIVE PROCEDURE ACT

(a) **Purpose.**

This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the function of rule making, investigation, advocacy and adjudication are not all performed by the same person in the administrative process

(b) **Rights.**

This Chapter confers procedural rights.